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IN THE MATTER OF THE COMPLAINT OF HENRY P. COUSENS OF OTTAWA ALLEGING DISCRIMINATION IN EMPLOYMENT BY THE CANADIAN NURSES ASSOCIATION, OTTAWA, CONTRARY TO THE ONTARIO HUMAN RIGHTS CODE

DECISION

DATED: MARCH 23, 1981

E.J. RATUSHNY
BOARD OF INQUIRY

IN THE MATTER OF THE COMPLAINT OF HENRY P. COUSENS OF OTTAWA ALLEGING DISCRIMINATION IN EMPLOYMENT BY THE CANADIAN NURSES ASSOCIATION, OTTAWA, CONTRARY TO THE ONTARIO HUMAN RIGHTS CODE

DECISION

This Board of Inquiry was appointed by the Minister of Labour of Ontario on the 15th day of April 1980, in relation to the complaint of Mr. Henry P. Cousens of Ottawa alleging discrimination in employment by the Canadian Nurses Association contrary to the Ontario Human Rights Code, R.S.O. 1970, c.318, as amended.

Upon being notified of the appointment of counsel for the Ontario Human Rights Commission and for the Respondent, the Chairman contacted them with a view to establishing dates for the hearing which would be mutually convenient to the parties. (Mr. Cousens was not personally represented by counsel) The date of October 21st, 1980 was agreed upon and formal notices of hearing were issued. Subsequently, a request was made by Commission counsel that the hearing be postponed until December. With the agreement of both counsel, the date of December 15th was set for the hearing and it did, in fact proceed, in Ottawa, on the 15th, 16th, 17th and 19th of December.

The Complaint of Mr. Cousens alleges that he was discriminated against in his employment because of his ancestry, in violation of section 4(1)(b) of the Code.

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At the outset of the hearing, counsel for the Commission indicated that, in addition to "ancestry", the Board would be asked to deal with two additional grounds of discrimination which are prohibited by section 4(1)(b), namely, "nationality" and "place of origin". Counsel for the Respondent immediately raised the objection that the Complaint had only specified "ancestry". It was argued that a respondent could be seriously prejudiced by coming to a hearing prepared to answer to a complaint on one ground, only to be met by evidence and argument in relation to a separate category of discrimination under the Code.

In ruling on this objection, the Board recognized the validity of the contention that prejudice could result. However, it was pointed out that section 14c. of the Code suggests that the mandate of a board of inquiry might well extend beyond the specific ground of contravention alleged in the complaint:

> 14c. The board after hearing a complaint, (a) shall decide whether or not any party <u>has</u> <u>contravened this Act</u>;...[Emphasis added]

In other words, the board is required not merely to decide upon the specific ground of discrimination which has been alleged, but to hear the circumstances of the complaint as presented by the parties and decide whether or not any party has "contravened this Act". The written complaint is not, therefore, in the nature of an information or indictment in a criminal case. Rather, it serves as general notice to a party in an administrative hearing.

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Of course, these comments do not resolve the question. The complaint still serves the central purpose of satisfying the notice requirements for a "fair hearing" in accordance with principles of Administrative Law. The Respondent only received notice a few days before the hearing that these additional grounds would be raised. Taking this into account, the Board ruled that it was prepared to grant an adjournment to enable counsel for the Respondent to conduct any further preparation which he might consider to be necessary as a result of the untimely notice in relation to these additional grounds. No such adjournment was sought.

Nevertheless, in final argument, Mr. Hynna returned to his original objection and argued that the Board did not have jurisdiction to deal with these additional grounds. In his submission, a board of inquiry may consider only the specific ground indicated in the written complaint itself. Therefore, it was argued, if at any time subsequent to the appointment of a board of inquiry, another ground of discrimination becomes apparent, that additional ground can only be considered if the Minister of Labour makes another appointment of a board specifying the additional ground.

This Board cannot accept that argument. Section 14b.(6) which deals with the jurisdiction of a board of inquiry, speaks in terms of the board "...reaching a decision as to whether or not any person has contravened this Act...". Reference has already been made to section 14c(a). Moreover, section 14b(1)(e) specifically authorizes the board to join additional persons as parties to the complaint. Would it not be anomalous for a board of inquiry to be authorized to add new parties

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to the complaint but to be precluded from modifying the grounds of the complaint against an existing party?

The wording of sections 14b.(6) and 14(c)(a) are sufficiently broad to bear the practical interpretation that a board of inquiry has jurisdiction to amend the alleged grounds of contravention specified in a complaint. Surely, it was not intended that the Minister of Labour should have to make an additional appointment simply because, in preparation for the hearing, another possible ground of contravention has become apparent. It is clearly in the interests of all of the parties and the citizens of Ontario that the substantial complaint be dealt with at one hearing taking into account all of the possible ways in which any party may have "contravened this Act".

However, it must be emphasized that the jurisdiction to modify the alleged grounds of discrimination, carries with it the obligation of providing adequate notice. Failure to provide sufficient notice to the parties and, where appropriate, the opportunity to adjourn for further preparation could result in a board of inquiry depriving itself of jurisdiction by failing to provide a fair hearing as required by section 8 of the Statutory Powers Procedure Act S.O. 1971 c.47, which provides:

> 8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

In the end, the additional grounds of "nationality" and "place of origin" did not affect the disposition of this matter.

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The Complainant, Henry P. Cousens is 55 years of age and a resident of Ottawa. His "mother tongue" is English. He joined the armed forces in 1943, directly from high school. Following the War, he studied at Carleton University and received the Bachelor of Arts Degree in 1950. Not long afterwards, he re-enlisted and remained in the army for twenty-one years until his retirement at the rank of major.

While in the armed forces, he was a member of the Pay Corps and involved in finance and administration. During this period he received courses in accounting management and administration as well as French language training. His last position was as Staff Officer, Budget, at Mobile Command in St. Hubert, Quebec. His responsibilities included monitoring the funding to bases and units as well as other expenditures, the transfer of funds, reconciliation of finances and the application of general accounting procedures. In effect, he was third in command in the administration of a budget of some $43 million. Prior to this (from 1966 to 1969), he served as Base Controller at the Canadian Forces Base in Montreal. There he was responsible for all financial matters at the base involving a budget of some $8 million and with a staff of approximately forty personnel, both military and civilian.

In the summer of 1971, he was employed as Director of Administration, Canadian Nurses Association Testing Service. This was a new position. The general duties are described in the letter (Exhibit C-3) offering him the position:

> In this position you will have primary responsibility for the delivery of tests to the respective provincial registering authorities. In addition you will also

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> have responsibility for the general administrative functions including accounting, purchasing, correspondence and data processing. In this position you will report directly to the Board to keep the members informed.

The "Board" referred to in this passage was the CNA Test Service Board which was composed of members representing the provincial nursing associations. Mr. Cousens also acted as Secretary of this Test Service Board.

Prior to 1970, the provincial nursing associations had relied upon examinations which were developed in the United States. However, when these became unavailable for use in Canada, the Testing Service was established to provide the necessary examinations. These examinations were developed by the Test Development Section of the Testing Service. They were then given to Mr. Cousens' department for typing, printing, distribution and retrieval. The Director of Test Development was Dr. Parrott. As Director of Administration, Mr. Cousens operated as an "equal" of Dr. Parrott and a good working relationship was established between them.

The examinations were used in English by all provinces in Canada and the North West Territories. In addition, French translations were used in Ontario and New Brunswick. The association in Quebec developed its own French language examinations.

Although the Testing Service was established under the Canadian Nurses Association (the C.N.A.), it had operated rather independently under the Test Service Board. However, in 1975 and 1976, the Testing Service was absorbed into the administrative structure of the C.N.A. and became a department of the latter, with all financial responsibilities and control being relinquished by Mr. Cousens and assumed directly by the C.N.A..

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Under the new organization structure, Dr. Parrott was appointed as Director of Testing Service and Mr. Cousens was appointed as Administrative Officer. Mr. Cousens now reported to Dr. Parrott rather than directly to the Chairman of the Test Service Board. Although Mr. Cousens' position was "red circled", he testified that the Executive Director of the C.N.A., Mrs. Mussallem, has assured him that this was not a demotion for him and that his position was secure. He understood that his salary was frozen while his position was being assessed and that, depending on the decision of the C.N.A., he might not get another increase. (In fact, he did subsequently receive increases, although these might have been limited to "cost of living" allowances.) Nevertheless, he concluded that apart from the change in reporting, there would be no change in his duties and performance.

Prior to 1976, Mr. Cousens had not received any significant criticism of his work performance. He had received salary increases and it was common for the Test Service Board to pass a motion indicating pleasure and satisfaction with his work at the end of each year.

Hisako Rose Imai is a highly qualified individual with a variety of experience in the field of health services. She served as a research officer with the C.N.A. from 1970 to 1972 and returned in September of 1977 as Director of Professional Services. During the following month, the Board of Directors of the C.N.A. considered a submission from the Test Development Officers of the Testing Service, to have their positions reclassified at a higher level. Although her responsibilities did not include the Testing Service, Miss Imai was asked by the Board of Directors to carry out a review of these positions.

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Apparently, Miss Imai involved Dr. Parrott in her review since, early in 1978, they jointly reported to the Executive Committee that the review would be difficult to undertake unless the entire Testing Service were reviewed. They were instructed to proceed on that basis and did.

At the time of this review, in early 1978, there was a full complement of three Test Development Officers on the English side but only one of three on the French side. This left only one officer to complete the crucial work on the French "comprehensive" examination.

Some years earlier, the policy decision had been taken to move from examinations which were divided into five general subject areas to "comprehensive" examinations which reflected a more "holistic" approach to nursing. This was a major step requiring years of painstaking development and hundreds of thousands of dollars. The Order of Nurses of Quebec had indicated that it would be prepared to use the new examinations of the Testing Service provided that they were not mere translations but were developed in French and provided that they were of sufficient quality in terms of content and language. In addition, the Order made it clear to the C.N.A. that the Testing Service as well as other services of the C.N.A. would have to be staffed with people who were fluent in French as well as in English.

By 1978, the delay in receiving a firm commitment from the Order of Nurses of Quebec was creating anxiety within the C.N.A.. In the words of its Executive Director:

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> There was the need to have confirmation that should the Association produce this very costly product, that we would have a market for it...
>
> We were uneasy about that lack of commitment although the people sat on our Committees, the test people that developed the test came to the Committee meetings, the people from the Order came to the Committee on testing services and we still had no commitment and we were getting very uneasy. The money was going down the drain and we were still uneasy.

In the words of Miss Imai, if the Quebec Order were not to purchase the French comprehensive examinations, "we would then have to consider the large amount of money that had already been expended as a loss and, you know, cut it at that point".

The absence of a commitment from Quebec also delayed the review which had been undertaken by Miss Imai and Dr. Parrott. While a variety of proposals for re-structuring the Testing Service were being considered by them, the ultimate choice would be significantly affected by the decision of the Quebec Order.

Finally, in late 1978, the senior officers of the C.N.A. and the Testing Service signed a "memorandum of understanding" to the effect that the C.N.A. would proceed with the completion of the French comprehensive examination "in good faith" and in spite of the absence of a written commitment from Quebec.

This cleared the way for completion of the review. A new "structure" was immediately put in place which eliminated Mr. Cousens' position and established the two new positions of Administrative Manager and Administrative Clerk. Mr. Cousens and then the other staff at the Testing

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Service, were informed of the change at successive meetings on December 13, 1978. This was confirmed to Mr. Cousens by a letter dated December 22, 1978, from Mrs. Mussallem which contained the following passages:

> The 1980 goal of English and French Comprehensive Examinations was foremost on our minds doing this review. To meet this goal, the director of testing service would require a broader, more comprehensive administrative system.
>
> In view of the fact that the French Comprehensive Examination will be a "new" product, it is essential that the candidate for the new position of Administrative Manager be fluently bilingual and preferrably [sic] a Francophone. As noted in our discussion with you, the position of Administrative Officer now becomes redundant.

In addition to the requirements specified in this letter, a Master's degree was also established as a requirement for the position of Administrative Manager. The position of Administrative Clerk was set at a salary level of approximately one-half of what Mr. Cousens had been receiving. He did not apply for either position. He was given three months' notice with his termination date established as March 30, 1979.

By letter dated December 29, 1978, Jean-Guy Bourque received confirmation of his appointment to the position of Assistant Manager. He commenced work early in February of 1979 and continued until the end of August, 1979, when he left because of his dissatisfaction with the nature of the position in question.

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Before moving to an assessment and analysis of these and other facts, consideration will be given to the legal questions which are raised by the issues in this case. There are two general propositions which have been adopted by previous boards of inquiry and which bear repeating here. The first is that in order to establish a contravention of the Code it is not necessary to prove that discrimination is the sole factor or even the most significant factor motivating the alleged discriminatory act. It need only be one factor. Counsel for the Commission cited R. v. Bushnell Communications Ltd. et al. (1974) 1 O.R. (2d 442), Aff'd (1974) 4 O.R. (2d) 288, in support of this proposition. Secondly, in order to establish a contravention, it is not necessary to demonstrate an intent to discriminate on the part of the respondent provided a discriminatory result does, in fact, occur. Mr. Hynna conceded this proposition.

The more difficult question is the significance of giving employment preference on the basis of whether or not a person is "Francophone". The Ontario Human Rights Code does not bar discrimination based on language. Therefore, in order to establish a contravention of the Code in a particular case, it would be necessary to demonstrate that the preference based on language extended to one of the grounds of discrimination which are prohibited by the Code. The potentially relevant ground in this case is "ancestry". It is necessary to define the terms "ancestry" and "Francophone".

The term "ancestry" is here interpreted to mean family descent. In other words, one's ancestry must be determined through the lineage of one's parents through their parents, and so on.

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This Board heard considerable argument as to the meaning of the term "Francophone". Counsel for the Commission suggested that in the Canadian context and in the context of this case, the word "Francophone" must be taken to mean "French-Canadian". Counsel for the Respondent, on the other hand, pointed out that a person may well be Francophone although not of French descent. A variety of dictionary definitions were presented, all of which relate to language spoken rather than descent.

It is the view of this Board that the Commission's position on this issue is simply untenable. To be Francophone is not necessarily to be of French descent, even in a Canadian context. The two definitions quoted by counsel for the Respondent from Canadian dictionaries were as follows:

> Parlant le francais; dont la langue maternelle est le francais. (Dictionnaire General de la Langue Francaise au Canada)
>
> A native speaker of French. (Canadian Edition, Funk & Wagnalls, Standard College Dictionary)

With respect to the latter definition, counsel for the Respondent submitted that "native speaker" had to be taken in the context of a person who has learned French as the first language and is totally brought up with and fully understands that language. This Board agrees with that submission and, for the purpose of this case, agrees that "Francophone" means French-speaking in the sense of having French as one's "langue maternale" or "mother tongue".

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This meaning is also consistent with the key phrase in the letter of termination ("fluently bilingual and preferrably Francophone"). The context suggests, at least, a requirement beyond fluency in French. It suggests a person who is completely comfortable in the French language. and familiar with its nuances. This kind of facility is normally associated with one's mother tongue. Moreover, this meaning is consistent with the testimony of Miss Imai and Mrs. Mussallem, who were responsible for the drafting of the letter and for establishing the requirements reflected in that letter for the new position of Administrative Manager.

However, to adopt this definition is not to conclude the matter. The question must still be faced as to the consequences of giving preference in hiring to a "Francophone". Notice must be taken of the reality that most (although not all) of the Francophones in Ontario to-day, have French as their mother tongue because they are of French ancestry. Similarly, most (although not all) of those who are not of French ancestry are not Francophone. As Mr. Cousens stated in his testimony: "I can become bilingual but I could not become a Francophone". In other words, a potential employee can acquire fluency in a language but cannot change his mother tongue.

The issue then boils down to how closely "mother tongue" is associated to "ancestry". Are they sufficiently related that to give preference in hiring on the basis of mother tongue (as opposed to fluency in language) could constitute discrimination on the basis of ancestry?

This Board has concluded that "mother tongue" is, in fact, closely enough associated to ancestry that to give preference in employment to

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a "Francophone" could constitute a contravention of the Ontario Human Rights Code on the basis of ancestry.

Consideration has been given to the absence of "language" as a ground of discrimination under the Code. In contrast, Section 46 of the Quebec Charter of Human Rights and Freedoms prohibits making employment dependant upon a language other than French unless the nature of the duties requires the knowledge of that other language. The Guide, "Equal Opportunities in Employment", published by the Commission des droits de la personne du Quebec, elaborates upon the language provisions in that province:

> Consequently, according to both the Charter of the French language and the Charter of human rights and freedoms, only the requirements of the job and the qualifications of the person shall be considered, not the feelings of the employer with respect to a particular language group.
>
> It is also contrary to the Charter of human rights and freedoms to exclude candidates who have an adequate command of the language or languages required, on the grounds that they have a different mother tongue. Employers cannot insist upon hiring a person whose mother tongue is French or English; others may have an adequate knowledge of the language required.
>
> When the job requires the knowledge of a language, other than the official it is wise not merely to ask for a bilingual person. The job offer should define the level of competence required in each of the languages. It may be specified, for example, that applicants for a given position must understand and speak French and English and be able to write French acceptably.

However, the absence of such a specific provision in Ontario is not crucial.

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In concluding that discrimination based on "mother tongue" may fall within the Ontario proscription in relation to "ancestry", account has been taken of Section 10 of The Interpretation Act R.S.O. 1970 c.225 requiring that legislation:

> ...shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Consideration has also been given to the "restrictive interpretation technique" which precludes the encroachment upon common law rights through ambiguous statutory provisions. However, there is no question of ambiguity here and, in any event, this technique of interpretation is not appropriate in relation to this modern type of "social purpose" statute. (See the Decision of the Board of Inquiry Re the Complaint of Roland Cooper, Ontario, July 27, 1973).

This Board simply cannot ignore the close relationship of "mother tongue" to "ancestry", particularly where the mother tongue is French, in Canada to-day. It is true that a great many Canadians to-day acquire the mother tongue of English in spite of ancestry which is not Anglo-Saxon. Nevertheless, where a francophone mother tongue is acquired, it is usually because of dominant French ancestry. Thus, to give preference in hiring to an "Anglophone" may not seem to be giving preference based on ancestry since many Canadians abandon the language of their ancestry in favour of English. However, it could constitute discrimination against those who do not.

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To take a blatant example, suppose that a storekeeper in Ontario insisted upon hiring only "Anglophones" as clerks. He has no personal feelings about non-Anglophones but is concerned that any trace of a non-English accent might antagonize the store's customers. The owner knows that some of them have strong prejudices against anything but English being spoken in Ontario. Would the store-owner be permitted to preclude all Francophones from employment on this basis?* For many Canadians of French descent, exclusion based on "mother tongue" is, effectively, discrimination based on ancestry. Surely, the intent of the Ontario Human Rights Code is to prohibit such effective discrimination based on ancestry even though the particular manifestation may be in language.

This Board fully recognizes that this proposition is not without difficulty. As Mr. Hynna effectively emphasized on behalf of the Respondent, mother tongue is not always related to ancestry. A child of French descent, because of the geographical location and related social environment in which his parents have become established, may be raised entirely in the English language. Similarly, a child of Anglo-Saxon descent may grow up with French as his mother tongue. Moreover, blood lines in Canada are becoming increasingly mixed. Ancestry may be difficult to determine.

All of these are relevant considerations which raise difficult issues. Suppose, in the example given earlier with respect to the store-keeper, that the Francophone who was denied employment was entirely of Anglo-Saxon descent but was born and raised in Quebec City. In these

* It is not necessary, for the purposes of this decision, to explore the relationship of these issues to "mother tongues" other than French.

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circumstances, his "mother tongue" could not be related to his ancestry. Therefore, in order to establish a contravention of the Code, he would have to relate his mother tongue to another proscribed ground such as "place of origin". These are difficult and important issues which may have to be resolved in future cases or through legislation.

Nevertheless, they do not detract from the basic reality that to permit discrimination based upon mother tongue is to open the door to discrimination based on ancestry in many situations. To permit preference in hiring for "Anglophones" may be an effective way of excluding many potential applicants who are of French descent just as to express preference for "Francophones" may be an effective way of excluding many potential applicants who are of non-French descent. It should be recalled, as well, that an intent to discriminate is not a necessary requirement in establishing a contravention of the Code.

At the same time, extensive and detailed language requirements often will be completely justifiable in the context of the position in question. A store clerk must have sufficient language skills to communicate effectively with the clientele of the store. A politician from a predominantly French-speaking constituency may require a speech-writer who can write comfortably and effectively in the language and usages of the area. An applicant may be fluent in French but without the special skills and sensitivity to language required in order to perform effectively in this specialized role.

The question then remains to be answered as to whether the termination of the Complainant's employment constituted a contravention of the Code. This requires a consideration of Mr. Cousens' employment perfor-

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mance, his language capability, the language requirements of his position and the factors which led to the termination of his employment.

Mr. Cousens came to the C.N.A. with considerable administrative skills and experience. He established a good working relationship with Dr. Parrott and appears to have been highly regarded by the members of the Board to which he reported. Nevertheless, the Executive Director of the C.N.A., Mrs. Mussallem, testified that even prior to 1975, she had been receiving numerous complaints about Mr. Cousens' performance. Indeed, there may well have been some tension between the C.N.A. General Manager and his staff on the one hand and Mr. Cousens on the other.

At the time of the integration of the Testing Service (and Mr. Cousens) under the direct responsibility of Mrs. Mussallem, she arranged for a review of the salaries for the Testing Service positions. This also involved interviews with the incumbents. As a result, Mrs. Mussallem concluded that Mr. Cousens' position was far too high on the scale. It was this conclusion which led to the "red-circling" and the decision to review Mr. Cousens' position as well as "the capabilities of the incumbent" by May 31, 1976. He was not informed of the latter aspect.

A considerable difficulty arises in accepting this evidence of difficulties with Mr. Cousens' performance at face value. The "Performance Review and Evaluation" of Mr. Cousens for 1975 and up to May of 1976 is extremely favourable. It was completed by Dr. Parrott, now Mr. Cousens' immediate superior. Amongst other things, it indicates

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that his work is "above average quality" and recommends a retroactive salary increase as well as an elevation in salary scale.

Moreover, Mr. Bourque, who was ultimately hired to fill the now position of Administrative Manager described Mr. Cousens as capable in fulfilling his duties. Mr. Bourque worked closely with Mr. Cousens in the final months of his employment with the C.N.A. and Mr. Bourque's observations are particularly helpful.

Miss Imai also spoke in generalities about complaints received in relation to Mr. Cousens. However, as with the testimony of Mrs. Mussallem, these are merely vague allegations. Dr. Parrott referred to a number of specific incidents involving "errors" made by Mr. Cousens. However, some of these complaints are so insignificant as to be termed petty. Throughout this period, there is no evidence of anyone discussing directly with Mr. Cousens any concrete and substantial concerns about his performance.

Finally, on February 10, 1978, there is a meeting between Mr. Cousens and Dr. Parrott, in which he outlines a number of concerns. This meeting is documented in Dr. Parrott's notes and is followed by a series of additional memoranda expressing concern about the performance of Mr. Cousens. It may or may not be coincidential that it was early in 1978 that Dr. Parrott commenced the structural review of the Testing Service with Miss Imai.

In sum, there is very little evidence that Mr. Cousens was not performing adequately in his position. There is significant evidence to the contrary.

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Was there, nevertheless, a need to "upgrade" the position to encompass responsibilities and require qualifications which Mr. Cousens was not capable of meeting? Witnesses for the Respondent conceded that a Master's degree was not really necessary for the new position. This Board accepts Mr. Lederer's contention, on behalf of the Commission, that Mr. Cousens' Bachelor's degree together with his Army experience and training and his previous experience with the C.N.A. should be sufficient to satisfy the requirement of a Master's degree "or equivalent" (Ex. R-17).

With respect to the duties and responsibilities of the Administrative Manager as compared with those of the Administrative Officer, the proof is "in the pudding". There is clear and compelling evidence that the requirements of the position were almost exactly the same after Mr. Bourque assumed the new position in February of 1979. Whatever may have been the hopes of the C.N.A. in establishing the new position in December of 1978, it turned out to be essentially the same position in 1979. Even in concept, the differences ascribed tend largely to be ethereal.

Was Mr. Cousens, then, dismissed because he was not sufficiently bilingual? The C.N.A. has an official policy that all senior officers be bilingual. The policy is admirable and, perhaps, crucial for an organization of this nature. However, it rings hollow as a reason for dismissing Mr. Cousens in this case.

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Mr. Cousens is not fluently bilingual. He has received considerable French-language training while in the armed forces in Quebec and, while there, was able to function in French. According to Mrs. Bourque, a former employee of the Testing Service, Mr. Cousens understood French very well. She observed that he understood what was being said in French. But clearly Mr. Cousens could not be described as "fluently bilingual".

There is considerable evidence that it was not necessary to be "fluently bilingual" in order to carry out Mr. Cousens' duties. Arrangements were available for translating letters and, after all, Mr. Cousens did function in this role for some seven years. Moreover, Dr. Parrott was in a more senior position and the evidence suggests that he had no capacity in French whatsoever. Surely, the need for bilingual capability would be far more serious in relation to this position.

Was there now a need to have someone who was "fluently bilingual" in Mr. Cousens' position? If so, then the need arose rather suddenly. In 1976, Mr. Cousens had requested the opportunity to upgrade his skills in French. He understood that the C.N.A. had received funds from the Secretary of State to provide French-language training. According to his testimony, all that was required to enable him to receive this training was for the C.N.A. to declare his position bilingual. This is confirmed in his Performance Review and Evaluation for 1976 by Dr. Parrott, which contains the following:

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2. Planned to upgrade French language communication skills.

(No. 2 was not followed up - awaiting outcome of review of bilingual policies in which C.N.A. was engaged).

His position never was classified as bilingual while he was with the C.N.A..

The job performance, the "re-organization" and the fact that Mr. Cousens was not fluently bilingual may all have been factors which led to his dismissal. However, when the facts are scrutinized, these factors diminish in importance. A significant factor may have been, simply, the inter-play of personalities. Mr. Cousens certainly had, within the C.N.A., some detractors who did not hesitate to express their views to Mrs. Mussallem. She, in turn, seems to have had a very negative impression of Mr. Cousens as early as 1975. His immediate superior and former personal friend, Dr. Parrott, was not likely to be terribly supportive in the organizational review which he was conducting with Miss Imai in early 1978. His attitude to Mr. Cousens had changed dramatically.

Was the fact that Mr. Cousens was not a Francophone, a factor in the loss of his position? The letter of termination dated December 22, 1978, is strong evidence that it was a factor. Mr. Cousens was, in effect, to be replaced by a Francophone. Both Miss Imai and Mrs. Mussallem suggested that the term was used solely to indicate the requirement of mastery of the French language. They claim that the use of the capital letter in "Francophone" was a typographical error. Mr. Lederer suggests that it may have been a Freudian slip. Not much importance is attached to it here.

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This Board concludes that a significant factor in the termination of Mr. Cousens' employment was the fact that he was not a Francophone. Therefore, his termination was an act of discrimination against him, as a person of an ancestry which (in the absence of special social factors) would preclude him from ever acquiring the "mother tongue" of French.

But this Board is prepared to go further. To express preference for a Francophone in addition to the requirement of being "fluently bilingual", particularly where there is no compelling job requirement for "complete mastery" of French, raises the question as to whether only language was a factor. Why was such a thorough knowledge of French required for this position? It is obvious that a French test development officer could properly be expected to have a "mastery" of the language but why should a lower echelon administrative officer? The expressed requirement is incongruous. Indeed, in Dr. Parrott's detailed notes for the December 13 meeting (R-17) the requirement for the new position is stated simply as "bilingual".

The C.N.A. moved with alacrity in appointing Jean-Guy Bourque to the new position. It appears from Miss Imai's testimony that his name was under consideration prior to the December 13 meeting informing Mr. Cousens of his termination. While he is a Francophone and a French-Canadian, Mr. Bourque does not seem to possess that complete mastery of French which had been considered to be so desirable. Mr. Bourque, who was a frank and forthright witness, spoke of his interview for the position in question prior to Christmas of 1978:

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> Well, I indicated at that time that I was bilingual. However, my higher education had been mostly in English. And I certainly felt more capable of communicating in English, because of that fact.

As discussed earlier, Mr. Bourque carried out essentially the same responsibilities as Mr. Cousens had assumed previously.

Reference has already been made to the anxiety which was created in 1978 because of the failure of the Quebec Order of Nurses to make a firm commitment to purchase the French comprehensive examination. In the middle of 1977, the Testing Service lost one of its three French test development officers. In March of 1978, the senior of the two remaining officers, Mr. Desmarais, also left. Mr. Desmarais had acted as a supervisor in relation to the French exam and had acted as a liaison with Quebec representatives.

In a letter dated October 3, 1978, the Quebec Order of Nurses expressed its concern about the absence of a francophone or a "perfectly bilingual" person to direct the development of the French language exam. Of course, a "mastery" of French would be essential to this position. However, it had been advertised for some time without success. The demands of the Quebec Order were well known and were referred to by a number of witnesses. Their representatives began to speak only French at C.N.A. meetings and they were pressing to have the C.N.A. increase its bilingual staff.

Lorraine Marie Bourque (no relation to Jean-Guy Bourque) was an English test development officer with the Testing Service from 1972 to

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1980. Since French was her mother tongue, she had been invited to work on the French exam. Her reasons for declining are of interest:

> I had made it known that I would never work with the French exam, because I felt that the nurses from Quebec would not be happy with my services, because I am a French-speaking person from New Brunswick; and the people in Quebec do make a distinction between New Brunswick and Quebec.

This passage suggests that, whether articulated or not, the expectations of the Quebec Order may have extended beyond facility in language.

It is no secret that, on accasion, public institutions face pressures to employ persons of different ethnic backgrounds. Reference might be made, merely in passing, to a public report to the City of Ottawa by the Bradet Committee, in March of 1980, recommending the expansion of French-language municipal services and the staffing of certain positions by "employees of the respective cultural groups". (Ottawa Citizen, June 2, 1980). There is no direct evidence that the Quebec Order of Nurses was applying pressure to have French Canadians (as opposed to bilingual persons) appointed by the C.N.A.. On the other hand, one would not expect pressures to be applied blatantly in such sensitive circumstances. The delay in confirming the adoption of the French comprehensive examination and the general posture of the Quebec Order may have made a subtle impression upon the officers of the C.N.A. just as one had been created in the mind of Miss Bourque.

One of the Quebec nurses had expressed directly to Miss Bourque the concern that the Director of Testing Service, Dr. Parrott, could

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not speak French. Lise Cecile Johnson worked as Dr. Parrott's secretary from 1977 to 1979. French is her mother tongue and she is fluently bilingual. She observed that Dr. Parrott was anxious to surround himself with bilingual people. She testified that when she started working for Dr. Parrott in January of 1977 he was an easy person to work for, but after a few months it became "increasingly difficult until finally it was unbearable". There was other evidence, as well, of difficulties in working with Dr. Parrott. There appears to be little doubt that he was experiencing severe pressure during this time.

Of course, the officers of the C.N.A. may have been entitled to terminate Mr. Cousens' employment. It may have been extremely desirable to have a fluently bilingual person (which he was not) in this position. However these do not appear to have been the main concerns of the C.N.A.. The evidence simply does not support the view that he was incompetent. The new position was almost identical to the old. The earlier position was not designated bilingual and he was denied the opportunity to take language training funded by the Secretary of State. The C.N.A. did not seek a person who was fluently bilingual but sought one whose mother tongue was French A complete "mastery" of French was stated to be the reason although there is no suggestion that the position required such skills. Meanwhile, the C.N.A. was facing intense pressure from the Quebec Order of Nurses.

There is certainly no direct evidence that what the C.N.A. really sought to do was to dismiss Mr. Cousens so that they could hire a French-Canadian. There very seldom is direct evidence of discrimination in

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these cases. Often it can only be proven by a pattern and coincidence of events coupled by the hollowness of explanations offered. In this case, the balance of circumstances leads to the conclusion that the real preference in employment, whether conscious or unconscious, was for a French-Canadian.

The Code provides that:

14c. The board, after hearing a complaint,...

(b) may order any party who has contravened this Act to do any act or thing that, in the opinion of the board, constitutes full compliance with such provision and to rectify any injury caused to any person or to make compensation therefor.

Counsel for the Commission requested that the order of this Board require a letter of apology to Mr. Cousens and the posting of a human rights poster in the C.N.A. premises informing employees of their rights under the Code. In addition, he requested that the Commission be permitted to write a memorandum to each of the employees of the C.N.A. informing them of their rights under the Code.

Such an order is inappropriate in this case. The facts do not establish a clear intention to discriminate on the part of the C.N.A.. While intent is not a condition of establishing a contravention, it is relevant to the order which should be made. Nor is there any evidence of a general pattern of discrimination by the C.N.A. against its employees. In these circumstances, the poster and memorandum are not appropriate either.

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Counsel for the Commission also requested monetary compensation for Mr. Cousens equal to the equivalent of three months pay as well as a sum to represent "loss of dignity". Counsel for the Respondent made no submissions with respect to the order which should be made if a finding of discrimination should occur.

In all of the circumstances, the proposal of the Commission is reasonable. It is ordered that the Respondent pay the Complainant a sum of money equivalent to three months of salary at his last salary level while an employee of the Canadian Nurses Association.

Mr. Cousens suffered considerable stress and some illness as a result of the loss of his employment. It took some eighteen months for him to re-establish himself and he suffered considerable loss of dignity as a result. In all of the circumstances, it is further ordered that the Respondent also pay to the Complainant the additional sum of $1000.

Dated this 23rd day of March, 1981

E.J. RATUSHNY
BOARD OF INQUIRY